IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-192

BARKER & BRATTON STEEL WORKS, INC.

Petitioner,

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY
TRAVELERS INDEMNITY COMPANY
and
VANKEL, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Barker & Bratton Steels Works, Inc., prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, to review its Judgment dated May 6, 1976 affirming a Judgment rendered by the United States District Court for the Southern District of Alabama against Petitioner.

I

OPINIONS BELOW

A. The Fifth Circuit Court of Appeals issued a per curiam decision, citing an earlier somewhat related case, but no opinion. The per curiam decision is set out as Appendix A hereto.

B. The District Court for the Southern District of Alabama did not issue an opinion, so designated, but did enter two documents, entitled, respectively, "Findings of Fact and Conclusions of Law on Motion for Summary Judgment filed by St. Paul Fire and Marine Insurance Company" and "Findings of Fact and Conclusions of Law on Motion for Summary Judgment filed by The Travelers Indemnity Company". These documents are set out in full as Appendices B and C.

C. The District Court also denied the Motion of Petitioner to Remand, (which is the issue on this Petition for Certiorari), but wrote no opinion on the point.

II

JURISDICTION

A. The Judgment of the Circuit Court of Appeals was entered on May 6, 1976 (Appendix D hereto). Rehearing was denied on June 22, 1976. (Appendix E hereto). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

III

QUESTIONS PRESENTED

Can a District Court and a Circuit Court of Appeals, simply for the sake of consistency, refuse to remand a case improperly removed on diversity grounds, there being no diversity, because these Courts had adjudicated on the merits an earlier diversity case, involving some of the same parties and some of the same issues.

IV

STATUTES INVOLVED

The statute provision involved is 28 USCA 1441(b). It appears in Appendix F hereto.

V

STATEMENT

Petitioner Barker & Bratton, a Texas corporation for diversity purposes, filed an action of the law side of the Circuit Court of Mobile County, Alabama, against two related insolvent Louisiana building construction corporations, two non-Alabama insurance companies, and an Alabama corporation. The suit attempted to reach bond proceeds generated by a defaulted construction job in Mobile County, Alabama. The suit alleged that the Louisiana corporations had contracted to build two buildings in a shopping center in Mobile, Alabama, for the landowning Alabama corporation, and that in the course thereof had placed material payment bonds for the benefit of the Alabama landowning corporation and for suppliers such as Petitioner. The Petitioner alleged that money from the bonds had been paid to the Alabama landowner which had paid it to certain strangers. There was thus complete diversity except for the defendant Alabama corporation, Vankel, Inc., the landowner, which was a party to both bonds. The two non-Alabama bonding companies removed the case to the Southern district of Alabama. Petitioner Barker & Bratton unsuccessfully moved to remand. The District Court granted Summary Judgments for both bonding companies after a questionable written analysis of the Alabama common law relating to beneficiaries under construction bonds (Appendix B & C). Petitioner Barker & Bratton appealed to the Fifth Circuit which affirmed the Summary Judgments, with no opinion, citing only the case of Smith-Kelly Supply Co. v. General Construction Co., 519 F.2d 1087 (5th Cir. 1975), affirming 399 F. Supp. 184 (S. D. Ala. 1975). This earlier case was a case of true diversity, between an Alabama materialman and one of the same Defendants, Travelers, a non-

Alabama corporation. The Smith-Kelly case had no federal issues. The State common law issue was whether the bond benefitted materialmen.

VI

REASONS FOR GRANTING THE WRIT

This case, strangely enough, falls directly in the middle of a great gap in the law on removal and remand. The numerous cases on the subject of non-removal under 28 USC 1441 (b) because of a local Defendant fall into two categories. One category is the insubstantial or fraudulently-joined local Defendant, and the other category is the clearly proper, substantial local Defendant. In the first case, of course, removal is clearly permissible, and in the other case remand is clearly indicated. This case however falls directly between the two cases. It is submitted that this is in fact the situation in the large majority of contested removals. Thus, while the large number of cases similiar to this case have made no great splash at the appellate level, the issue is of tremendous daily importance in the District Courts.

The paucity of reported decisions in this middle ground is apparently due to the practice of District Courts to ascertain as a matter of fact at a pretrial stage that the local Defendant falls into one of the two categories, since these two categories are the only ones that are represented by the appellate court decisions.

In the present case the Courts below decided, in a case involving novel and complex issues of Alabama bond law, that the local Defendant landowner was not liable on the bond. Thus, for the sake of consistency, the Courts below refused to grant this Petitioner a hearing upon the additional issues raised by the Petitioner against the local Defendant. The Courts below

ruled in effect that if one materialman is adjudicated to have no recovery in a certain transaction, a second materialman must also not recover even though he brings in additional parties, and issues different theories. In an attempt at consistency the Courts below ignored the right of Petitioner to try its case in the State Courts against the local Defendant and the other non-resident Defendant.

This attitude of the Fifth Circuit conflicts with that of other circuits, the Eighth Circuit has ruled on several occasions that the question of whether joining a local Defendant prevents removal is whether the Plaintiff intended to obtain a judgment against the local Defendant. Bolstad v. Central Surety & Insurance Corp. (CCA8th, 1948) 168 F2d 927; Harrelson v. Missouri Pacific Transport Co. (CCA8th, 1936) 87 F2d 176; Huffman v, Baldwin (CCA8th, 1936) 82 F2d 5; Leonard v. St. Joseph Lead Co. (CCA8th, 1935) 75 F2d 390. Federal District Courts have held likewise in Garroute v. General Motors Corp. (WD Ark 1959) 179 F Supp 315; New York Shipping Ass'n. v. International Longshoremen's Ass'n., AFL-CIO (SD NY 1967) 276 F Supp 51; Continental Oil Co. v. PPG Industries, Inc. (SD Tex 1973) 335 F. Supp 1183; Moore v. Mauer Neuer Corp. (WD Mo 1945) 59 F Supp 690; and Guess v. Kellogg Switchboard & Supply Co. (ND Cal 1956) 143 F Supp 807, 808.

The long list of District Court cases cited, arising from several states, with only the Eighth Circuit and now the Fifth Circuit in conflict to guide them, illustrates the Petitioner's theory that the removal problem here is a serious day-to-day problem in the lower Federal Courts. The Fifth Circuit is announcing, in conflict with the Eighth Circuit, that these District Courts should look into the merits of the case against the local Defendant at some pretrial stage, and from this pretrial examination resolve the jurisdiction-remand question by deciding the prospective merits of the case. If it seems that the local Defendant should lose on the merits, the case should be remanded. If it

seems that the local Defendant will win on the merits, remand should be denied.

The Federal District Court upon receiving a Motion to Remand should ascertain in accordance with the Eighth Circuit rule whether the Plaintiff really intended to obtain a judgment against the local Defendant. If so, the case should be remanded. If the State law is uncertain, and it is uncertain who will prevail, the case should be remanded.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted and the decree of the Court of Appeals should be reversed.

Respectfully submitted,

SAMUEL M. McMILLAN
Post Office Box 2345
1202 Commercial Guaranty Bank Building
Mobile, Alabama 36601
Counsel for Barker & Bratton Steel Works, Inc.

CERTIFICATE OF COUNSEL

I, SAMUEL M. McMILLAN, the attorney for the Petitioner herein, certify that copies of said Petition have been served on Emmett R. Cox and A. Neil Hudgens, attorneys for Respondents, by delivering copies to them at their respective offices at 3311 First National Bank Building, and 601 Bel Air Blvd., Mobile, Alabama, this 9th day of August, 1976.

SAMUEL M. McMILLAN

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-4166
Summary Calendar*

BARKER & BRATTON STEEL WORKS, INC.,
Plaintiff - Appellant,

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, et al.,
Defendants - Appellees.

Appeals from the United States District Court
for the Southern District of Alabama

(May 6, 1976)

Before AINSWORTH, CLARK and RONEY, Circuit Judges. PER CURIAM: AFFIRMED. See Smith-Kelly Supply Co. v. General Construction Co., 519 F.2d 1087 (5th Cir. 1975), affirming 399 F.Supp. 184 (S. D. Ala. 1975).

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F. 2d 409. Part 1.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BARKER & BRATTON STEEL WORKS, INC.,
Plaintiff,

versus C.A. No. 75-179-H

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, et als,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
MOTION FOR SUMMARY JUDGMENT FILED BY
ST. PAUL FIRE AND MARINE INSURANCE COMPANY

The motion for summary judgment filed herein by St. Paul Fire and Marine Insurance Company (herein called "St. Paul") coming on to be heard and the Court having heard from counsel and considered the matter enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On or about July 9, 1973, General Construction Corporation, a corporation, entered into a written agreement with Vankel, Inc., a corporation, by the terms of which General Construction Corporation agreed to construct a building for Vankel, Inc. A copy of said agreement is before the Court as Exhibit C to the Request for Admission served by the defendant St. Paul on June 30, 1975, the authenticity of which the plaintiff has admitted by failure to respond to the request.

2. General Construction Corporation, as principal, and St. Paul, as surety, executed a performance bond naming Vankel,

Inc. as obligee. A copy of the bond and indemnity are before the Court as Exhibits A and B, respectively, to the Request for Admissions served by the defendant St. Paul on June 30, 1975, the authenticity of which the plaintiff has admitted by failure to respond to the request.

3. The plaintiff, Barker & Bratton Steel Works, Inc., alleges that it supplied steel to contractor, and further alleges that the price of the steel, $57,800.00 has not been paid. Further, the plaintiff alleges that the aforesaid bond was entered into for the benefit of materialmen including the plaintiff, and that the defendant St. Paul has paid proceeds of the bond which should have been paid to the plaintiff to other parties.

4. The Court does not make an express finding of fact that the plaintiff did in fact sell steel to General Construction Corporation for use in the aforesaid building for which the plaintiff has not been paid, but assumes those facts for the purpose of making an adjudication upon the defendant St. Paul's motion for summary judgment.

CONCLUSIONS OF LAW

1. An unpaid materialman who has supplied a general contractor materials for use in completing a construction contract evidenced by a written agreement between the general contractor and the owner of the construction project under the terms of which the general contractor agrees to furnish materials for use in the construction but does not expressly provide for the payment of the same, said construction contract being secured in its performance by a bond upon which the general contractor is principal and the owner is surety, the bond being conditioned upon the faithful performance of the construction contract by the principal free and clear of liens arising out of claims for materials, and being further conditioned on indemnification and saving harmless the obligee, has no cause of action against

the surety upon the bond. Fidelity and Deposit Company vs. Rainer, (1929) 220Ala. 266, 125 So. 55, 77 A.L.R. 13; David Lupton's Sons' Construction Company vs. Hugger Brothers Construction Company (1933) 227 Ala. 25, 148 So. 610; Adams Supply Company vs. United States Fidelity and Guaranty Company (1959) 269 Ala. 171, 111 So. 2d 906; American Law Institute, RESTATEMENT OF THE LAW OF SECURITY (1941) Sections 165, 166.

In the case of Smith-Kelly Supply Company, Inc. vs. General Construction Corporation and The Travelers Indemnity Company, Civil Action No. 74-834-H (S.D., Ala. 1975) this Court had before it the question of whether or not a materialman could sue on a similiar bond involved in the case at bar. This Court ruled that a materialman could not sue on this bond and granted the Travelers' motion for summary judgment in that case. The propriety of this Court's action in granting the motion for summary judgment was raised on appeal by Smith-Kelly, and the Fifth Circuit affirmed. Smith-Kelly Supply Co., Inc. vs. General Construction, et al. (75-1939, Court of Appeals, Fifth Circuit 1975)

2. Having decided that a similar bond in question was not executed for the benefit of materialmen, the fact that proceeds of the bond may have been paid to other parties would be a matter of no concern to the plaintiff.

3. There is no genuine issue as to any material fact necessary to a determination as to the nonliability of the defendant St. Paul Fire and Marine Insurance Company, and the defendant St. Paul Fire and Marine Insurance Company is entitled to judgment in its favor as a matter of law.

Done this 16th day of October, 1975.

W. B. Hand
United States District
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BARKER & BRATTON STEEL WORKS, INC.,
Plaintiff,

versus C.A. No. 75-179-H

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, et als.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
MOTION FOR SUMMARY JUDGMENT FILED BY
THE TRAVELERS INDEMNITY COMPANY

The motion for summary judgment filed herein by The Travelers Indemnity Company (herein called "Travelers") coming on to be heard and the Court having heard from counsel and considered the matter enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On or about July 9, 1973, General Construction Corporation, a corporation, entered into a written agreement with Vankel, Inc., a corporation, by the terms of which General Construction Corporation agreed to construct a building for Vankel, Inc. A copy of said agreement is before the Court as Exhibit B to the Request for Admission served by the defendant Travelers on June 27, 1975, the authenticity of which the plaintiff has admitted by failure to respond to the request.

2. General Construction Corporation, as principal, and Travelers, as surety, executed a performance bond naming Vankel, Inc. as obligee. A copy of the bond is before the Court as Exhibit A to the Request for Admission served by the defendant Travelers on June 27, 1975, the authenticity of which the plaintiff has admitted by failure to respond to the request.

3. The plaintiff, Barker & Bratton Steel Works, Inc., alleges that it supplied steel for construction through Commercial Industrial Builders, Inc., an affiliated corporation, and further alleges that the price of the steel, $45,700.00 has not been paid. Further, the plaintiff alleges that the aforesaid bond was entered into for the benefit of suppliers, including the plaintiff, and that the defendant Travelers has paid proceeds of the bond which should have been paid to the plaintiff to other parties.

4. The Court does not make an express finding of fact that the plaintiff did in fact sell steel to General Construction Corporation for use in the aforesaid building for which the plaintiff has not been paid, but assumes those facts for the purpose of making an adjudication upon the defendant Travelers' motion for summary judgment.

CONCLUSIONS OF LAW

1. An unpaid materialman who has supplied a general contractor materials for use in completing a construction contract evidenced by a written agreement between the general contractor and the owner of the construction project under the terms of which the general contractor agrees to furnish materials for use in the construction but does not expressly provide for the payment of the same, said construction contract being secured in its performance by a bond upon which the general contractor is principal and the owner is surety, the bond being conditioned

upon the faithful performance of the construction contract by the principal free and clear of liens arising out of claims for materials, and being further conditioned on indemnification and saving harmless the obligee, has no cause of action against the surety upon the bond. Fidelity and Deposit Company vs. Rainer, (1929) 220Ala. 266, 125 So. 55, 77 A.L.R. 13; David Lupton's Sons' Construction Company vs. Hugger Brothers Construction Company (1933) 227 Ala. 25, 148 So. 610; Adams Supply Company vs. United States Fidelity and Guaranty Company (1959) 269 Ala. 171,111 So.2d 906; American Law Institute, RESTATEMENT OF THE LAW OF SECURITY (1941) Sections 165, 166.

In the case of Smith-Kelly Supply Company, Inc. vs. General Construction Corporation and The Travelers Indemnity Company, Civil Action No. 74-834-H (S.D., Ala. 1975) this Court had before it the question of whether or not a materialman could sue on the same bond involved in the case at bar. This Court ruled that a materialman could not sue on this bond and granted the Travelers' motion for summary judgment in that case. The propriety of this Court's action in granting the motion for summary judgment was raised on appeal by Smith-Kelly, and the Fifth Circuit affirmed. Smith-Kelly Supply Co., Inc. vs. General Construction, et al. (75-1939, Court of Appeals, Fifth Circuit 1975)

2. Having decided that the bond in question was not executed for the benefit of materialmen, the fact that proceeds of the bond may have been paid to other parties would be a matter of no concern to the plaintiff.

3. There is no genuine issue as to any material fact necessary to a determination as to the nonliability of the defendant. The Travelers Indemnity Company, and the defendant The Travelers Indemnity Company is entitled to judgment in its favor as a matter of law.

Done this 16th day of October, 1975.

W. B. Hand
United States District
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 75-4166
Summary Calendar

D. C. Docket No. CA75-179-H

BARKER & BRATTON STEEL WORKS, INC.,
Plaintiff - Appellant,

versus

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Alabama

Before AINSWORTH, CLARK, and RONEY, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern

District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

May 6, 1976

Issued as Mandate:

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

June 22, 1976

TO ALL COUNSEL OF RECORD

No. 75-4166 — Barker & Bratton Steel Works, Inc.
v. St. Paul Fire and Marine Insurance
Company, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit

Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Susan M. Grovers
Deputy Clerk

/smg

cc: Mr. Samuel M. McMillan
Mr. A. Neil Hudgens
Mr. Emmett R. Cox

APPENDIX F

28 U.S.C. 1441

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.